***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-1311

*To be argued by*
CONSTANCE CUSHMAN

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P/S

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1311**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

MELVIN DAVIS,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA


PAUL J. CURRAN,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

CONSTANCE CUSHMAN,
JOHN C. SABETTA,
*Assistant United States Attorneys*
*Of Counsel.*



UNITED STATES COURT OF APPEALS
FILED
OCT 30 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1311**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

MELVIN DAVIS,

*Defendant-Appellant.*

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Melvin Davis appeals from a judgment of conviction entered on July 30, 1975, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 75 Cr. 147, filed on February 11, 1975, charged appellant and Betty Kendrick, along with others named as co-conspirators but not as defendants, with one count of conspiring to utter forged instruments in violation of Title 18, United States Code, Sections 495 and 2. On April 14, 1975, superseding Indictment S. 75 Cr. 379 was filed charging Melvin Davis as the only defendant with the same conspiracy alleged originally, except that Betty Kendrick (and Shiela Ketchen) were named as co-conspirators but not as defendants. Additionally, Davis was charged with twenty counts of uttering stolen and

forged United States Series E Savings Bonds, in violation of Title 18, United States Code, Sections 495 and 2.

Trial began on June 30, 1975. On July 1, 1975, the jury convicted Melvin Davis on all twenty-one counts. On July 30, 1975, Judge Frankel sentenced defendant, who had been remanded following trial, to a term of eighteen months imprisonment on Count One. On Counts Two through Twenty-One imposition of sentence was suspended, and Davis was placed on probation for a period of three years to begin following his release from confinement under the sentence imposed on Count One. He is presently in custody serving his sentence.

## Statement of Facts

### The Government's Case

Mary Levy, an 83-year-old retired bookkeeper, testified that on February 1, 1974, she entered a restaurant at 275 Seventh Avenue, carrying 40 Series E United States Savings Bonds in her purse. When she tried to pay her check she found her purse missing. A week later it was found in Manhattan, the bonds missing. Her signature was not on the bonds when they were stolen, and she never authorized anyone else to sign her name. At trial she identified as hers the bonds, which had been presented by others for encashment at various banks in Connecticut and Pennsylvania. She testified that the signature on the backs was not her signature.

Sheila Ketchen testified that in the first week of February, 1974 she received a call from Melvin Davis who was in a Manhattan bar, asking her to handle the cashing of some bonds. She discussed with him the issue dates of the bonds, and agreed to meet him to inspect them and see if she could cash them. She immediately went to that bar, where she met Davis and a young man she thought

was named Kareem. Davis left the booth, telling Kareem to talk to Ketchen, but returned by the time Ketchen had begun inspecting the bonds. Because the bonds had been issued in 1942 and 1943 Ketchen said she needed someone to help her cash them. She said she knew someone who would be suitable.

The other woman, Betty Kendrick, was in the hospital. After a number of days, Ketchen visited her in the hospital and enlisted her cooperation. Kendrick also testified concerning this meeting. Several days later, after Kendrick had left the hospital, Ketchen went with Davis to Kareem's hotel room. Davis brought along a typewriter, but left to get his car repaired while Ketchen and Kareem prepared identification for cashing the bonds.

Within a few days all agreed that the time had come to cash the bonds. Ketchen suggested that she had cashed so many in New York that it would be easier to try out of state. Both Kendrick and Ketchen testified that the day before their first attempt Davis and Kendrick stayed at Ketchen's house, and on the morning of February 20, 1975, when they picked up the bonds from Kareem, the three decided that they would go to Connecticut to cash the bonds. That day, in furtherance of their plan, all three drove to several banks in Connecticut.

The operating procedure was the same at each bank. Davis kept custody of the bonds and, each time they stopped at a bank, would give the women the bonds to be cashed. The women would enter the bank, Kendrick posing as Mary Levy and Ketchen as her nurse, while Davis remained in the car. Kendrick would offer the bonds for payment, and if the bank agreed to cash them, would sign Mary Levy's name on the backs. When the women returned to the car they would give Davis any cash received and the uncashed bonds. That day the two women successfully cashed about $1,000 in bonds, but

efforts to cash the remainder of the bonds they had in hand were unsuccessful. Upon their return to New York later that day, the trio, along with Kareem, split the $1,000 into four equal shares.

The following day the two women and Davis went to Philadelphia to try to cash more of the bonds. They followed the same procedure as the day before. Davis remained in the car while the women entered the bank, but between attempts Davis kept custody of the bonds. Attempts to cash the bonds at three separate banks were unsuccessful. Finally, on their way home, they stopped at a fourth bank in Pennsylvania and successfully cashed twenty bonds, totalling in face value $2,300, for close to $4,000. Kendrick endorsed the bonds in the bank with Mary Levy's name, presenting a driver's license as identification. On the return trip to New York City Davis' car broke down. As the trio was towed to a nearby station, they divided the money Kendrick and Ketchen had received into four shares, one for each of them and Kareem. Davis' car was subsequently abandoned and the trip to New York City completed by taxi.

The following day Kendrick rented a car and the three drove again to Connecticut where they attempted unsuccessfully to cash more of the bonds. They tried several banks, returning to one twice. Both women identified surveillance photographs of themselves in Connecticut banks on February 22, 1975. After the second unsuccessful attempt at one bank, and as they were driving into a fast food restaurant, a police officer approached the trio and questioned them. Kendrick identified herself, as did Davis. No one produced the identification of Mary Levy. The group denied having any bonds and was not arrested at that time. Davis kept the bonds and all three drove home to New York.

Bernard Grant, Branch Manager of the Wethersfield office of the Hartford National Bank in Hartford, Connecticut, testified that on February 20, 1974, he had been asked to authorize the cashing of Series E Savings Bonds. The woman who presented the bonds gave insufficient identification, and although the bonds had already been stamped, he refused to authorize their cashing. He, too, identified the surveillance photograph of the two women taken in the bank on that day.

Dennis Lynch, a tow-truck driver in Bordentown, New Jersey, testified that a record he made at the time, which his employer retained, reflected that on February 21, 1975, he had towed "M. Davis' " car off the New Jersey Turnpike to Lynch's Garage in Bordentown. Robert Bain, a taxicab driver employed by Johnny's Cab, in Bordentown, testified that he had driven Ketchen, Kendrick, and Davis from Bordentown to New York on February 21, 1975. He identified Davis in court.

Nelson J. Lombardi, a police officer in the Guilford Police Department, Guilford, Connecticut, testified that on February 22, 1975, he had spoken with bank officers at two Connecticut banks, and as a result of his conversations had questioned Mr. Davis, whom he identified in Court, and two women concerning attempts to cash bonds at banks in Connecticut. Davis and one woman produced identification, but all three denied any knowledge of the bonds, and he did not arrest them at that time.

## The Defendant's Case

Defendant called no witnesses and did not take the stand. The defense case consisted primarily of attempts to discredit the testimony of the two women, Kendrick and Ketchen.

## ARGUMENT

### POINT

**Venue of the substantive offenses charged in Counts Two through Twenty-one was properly lodged in the Southern District of New York.**

Appellant was charged and convicted as an aider and abettor of the substantive offense of uttering forged bonds. His argument now on appeal is that he was not an accessory to the crimes, but rather a principal, and that his accessorial acts in New York were merely incidental to his commission of the substantive offenses. Consequently, he claims, relying upon *United States* v. *Rodriguez*, 465 F.2d 5 (2d Cir. 1972) and *United States* v. *Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970), *aff'd*, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971),* that venue of his trial on the substantive offenses could properly be lodged only in the Eastern District of Pennsylvania, where the bonds were cashed, and not in the Southern District of New York.

Davis' argument overlooks this Court's explicit analysis in *Rodriguez* of 18 U.S.C. § 495—the statutory predicate for Davis' convictions of the offenses of uttering forged instruments about which he complains. *Rodriguez* clearly holds that venue of the offense of uttering a forged instrument lies only in the district where the instruments were offered, because the offense is a "single act crime" rather than a "continuing offense" within the meaning of 18 U.S.C. § 3237 and *Travis* v. *United States*, 364 U.S.

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* *Sweig*, *supra*, holds that a principal may not be tried for an offense which is a "single act crime" in a district other than that where the substantive crime occurred, but where accessorial acts took place.

631 (1961). 465 F.2d at 10-11. "Offering the forged writing is the single unequivocal act which completes the offense." *Id.* at 11. In the instant case the proof at trial showed, and Davis in his brief concedes,* that he did not himself tender the bonds to the bank for encashment. He gave them to his accomplices, Kendrick and Ketchen, who presented them for payment at the bank. In fact, the forged signatures in each case were placed on the bonds by Ketchen in the bank, at a time when Davis no longer had them in his custody to offer. Clearly, under *Rodriguez* and other controlling authority (*see infra*), Davis did not commit the substantive offenses. The fact that he performed numerous preparatory acts and was present nearby when the substantive offenses were consummated cannot obscure the undisputed fact that he himself did not utter the forged instruments. *See United States* v. *Chappell*, 353 F.2d 83, 85 (4th Cir. 1965).

The major thrust of Davis' argument consists of his effort to show that, under the common law, he would have been considered a principal in the commission of the offense, because he instigated the crime and was physically nearby when it was committed, even though he did not commit the substantive offense. His argument, of course, ignores the fact that statute, not merely the common law, now defines the respective liability of principals and accessories. Indeed, the only current

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* Appellant's brief states, "At the time of the cashing, [Davis] was waiting outside in an automobile." At 3. "With the exception of the fact that Davis was outside the bank and the two women were inside, there is little to distinguish Davis' role from that of Kendrick and Ketchen." At 11. Of course, it was inside the bank that Ketchen signed the bonds and presented them for payment. The Government submits that under *Rodriguez* and other controlling authorities, this is a crucial distinction between one who is guilty of the substantive offense, and one who is guilty of aiding and abetting the commission of the substantive offense.

authority which he cites to support his argument, at the very page he cites, itself expressly states:

> "Modern statutes have largely obliterated the significance of these discrete modes of criminal participation. Apart from the accessory after the fact, who is still generally subject to a lesser punishment, the punishment is the same for the three main modes of complicity; and it is no longer the case that accessories to crime cannot be convicted until their principal is convicted (although, of course, it must be proved that a crime was committed); and it is no longer necessary in most states for a defendant to be charged with and convicted of a particular form of complicity. These changes are the result of statutes, most of which abolish all distinction between principals and accessories before the fact, requiring that all be treated as principals. See Model Penal Code, Tent. Draft No. 1 (1953), App., Statutory Treatment of Complicity, 40-41.
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> * * * * *
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> . . . [T]he respect in which the common law rules are of major significance today is that statutes (and the courts as well) tend to use common law language to describe the character of involvement in the criminal acts of another which renders a person criminally liable for those acts. Broadly the terminology purports to describe the necessary degree of involvement in another's acts on two levels: one, in participating in the decision to commit the crime ("advising," "encouraging," "procuring," "commanding," "hiring") and two, in the preparation for, or in the actual consummation of, the crime ("aiding," "abetting," "assisting"). See generally Perkins, Parties to Crime, 89 U. of Pa. L. Rev. 581 (1941).
>
> Kadish and Paulsen, Criminal Law and Its Processes (1969) at 411, 412.

The statute in this case, Title 18, United States Code, Section 2, provides that one who aids and abets in the commission of a crime is punishable as a principal. Under 18 U.S.C. § 2, one indicted as a principal may be convicted as an aider and abettor and punished as a principal, *United States* v. *Rodriguez*, *supra*, 465 F.2d at 9; *cf. United States* v. *Sahadi*, 292 F.2d 565, 568-569 (2d Cir. 1961); *Theriault* v. *United States*, 401 F.2d 79 (8th Cir. 1968), *cert. denied*, 393 U.S. 100 (1969); *United States* v. *Ramsey*, 374 F.2d 192, 196 (2d Cir. 1967). Likewise, one indicted as an aider and abettor may be convicted, upon proper proof, as a principal, and so punished. *United States* v. *Bryan*, 483 F.2d 88 (3d Cir. 1973). Here, Davis was both indicted and convicted as an aider and abettor.

Davis' argument focuses on one remaining distinction between a principal and an accessory, namely, the differing rules of venue governing each. Title 18, United States Code, Section 2 has been held to enlarge, but not to supplant, the common law rules of venue governing aiders and abettors. An aider and abettor may be tried either in the district where the substantive offense was committed by the principal, whether or not he performed there any acts in furtherance of the crime, *United States* v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974), or, as at common law, in the district where he performed accessorial acts, even if that is not the place where the substantive crime was committed. *United States* v. *Gillette*, 189 F.2d 449 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951); *United States* v. *Klosterman*, 147 F. Supp. 843 (D.C. Pa. 1957), *rev'd on other grounds*, 248 F.2d 191 (3d Cir. 1957); *United States* v. *Callahan*, 300 F. Supp. 519 (S.D.N.Y. 1969). This rule has been held to be constitutional. *United States* v. *Kilpatrick*, 458 F.2d 864 (7th Cir. 1972).

A principal, however, must be tried in the district in which the substantive crime was committed, and not in another district where preparatory acts took place. *United States* v. *Sweig, supra.* Only if the offense itself can be said to have occurred in more than one district within the meaning of 18 U.S.C. § 3732 is venue expanded. *United States* v. *Travis, supra.* The "offenses" to which Section 3237 refers are the substantive offenses, not the aiding and abetting of such substantive offenses. *United States* v. *Bozza,* 365 F.2d 206 (2d Cir. 1966).

Davis contends, and the Government agrees, that for purposes of the venue provisions of 18 U.S.C. § 3732 the crime of uttering a forged instrument does not occur in more than one district. *United States* v. *Rodriguez, supra.* Under that authority, were Davis a principal, venue of his trial would indeed lie only in the Eastern District of Pennsylvania.

The Government submits, however, that for purposes of determining venue, a principal is one against whom, on the evidence presented, there can be a finding of each element of the statutory offense charged. An aider and abettor on the other hand is one whose participation is such that as to him personally one or more elements of the offense charged cannot be proven.* For purposes of determining venue, the terminology describing various modes of criminal participation under the common law is no longer meaningful. The cases construing rules of venue are consistent with this approach.

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* The facts supporting venue must be proved at trial and, since those facts are inextricably intertwined with the merits of the case, if the indictment alleges facts sufficient to support venue on any theory of proof, the final ruling on the issue of venue may, of course, rest upon the actual proof developed at trial. *United States* v. *Callahan, supra.*

In determining venue, the keystone is always the Constitutional provision that persons must be tried in the place the crime was committed. United States Constitution, Article II, Section 2; Sixth Amendment. In this regard, inquiry always focusses upon the nature of the offense committed, for the purpose of determining exactly where the offense was committed.* This same focus on the precise nature of the offense alleged clearly governs when the question is whether a defendant is a principal or an aider and abettor. See *United States* v. *Flaxman*, 304 F. Supp. 1301, 1303 (S.D.N.Y. 1969).

The law is clear that an element of the offense of uttering a forged instrument is the offering of that instrument with the representation by words or actions that it is genuine. BLACK'S LAW DICTIONARY, 1716 (rev. 4th ed. 1968). "In order to commit the substantive offense of uttering a forged Treasurer's check [in violation of 18 U.S.C. § 495], there must be some attempt to circulate the check by means of a fraudulent representation that it is genuine." *United States* v. *Brown*, 495 F.2d 593, 597 n. 4 (1st Cir. 1974). *See United States* v. *Sullivan*, 406 F.2d 180 (2d Cir. 1969); *United States* v. *Jenkins*, 347 F.2d 345, 347 (4th Cir. 1965); *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960); *United States* v. *Rader*, 185 F. Supp. 224, 230 (W.D. Ark. 1960), *aff'd*, 288 F.2d 452 (8th Cir.), *cert. denied*, 368 U.S. 851

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* "The *locus delecti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson*, 328 U.S. 699, 703 (1945), quoted in *United States* v. *Travis*, *supra*, 364 U.S. at 635. Similarly, in *Sweig*, ruling on pre-trial motions to dismiss, the Court focussed upon the factual nature of the offense with which defendant was charged, to determine first, that it was not a continuing offense, and second, that Sweig was a principal, indeed the only person who could have committed the offense as charged in the indictment. *See also*, *United States* v. *Rodriguez*, *supra*; *Krogmann* v. *United States*, 225 F.2d 220, 227 (6th Cir. 1955); *Reass* v. *United States*, 99 F.2d 752 (4th Cir. 1938).

(1961). Therefore Davis, who never himself performed the ultimate act of offering the falsified bonds for payment, could be tried for his commission of all accessorial and preparatory acts in this District as well as in the Eastern District of Pennsylvania. Even in *Rodriguez*, upon which appellant so heavily relies, the Court explicitly held that defendant Rodriguez, who had given one Mrs. Pena a falsely endorsed check knowing that the latter intended to cash it, could be tried, either in the Eastern District of New York as a principal because she herself there uttered the check to Mrs. Pena, or, for the same transaction, in the Southern District of New York as an accessory to Mrs. Pena's subsequent act, in Manhattan, of uttering the forged check. The Government in that case chose the latter proof, and the District Court submitted the case to the jury on that basis. The Circuit Court upheld venue on that theory, reversing only because another, invalid theory of venue was also submitted to the jury.*

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* Appellant (Brief, at 10) attempts to draw indirect support from the authority of *Gillette*, *Rodriguez*, and *Sweig*, by comparing the fact patterns in those cases with that here, and arguing that if the defendants there had actually traveled to the scenes of the crimes, they, too, would have been principals. The argument fails. In *Gillette*, the substantive offense was interstate transportation of counterfeit American Express Checks. Travel was an element of the offense. In *Rodriguez*, had defendant gone to Manhattan with the woman who there uttered the forged check, but had not herself offered the check at the bank, she would not have been the principal. In *Sweig*, the offense charged was "acting as an agent" before agencies of the United States Government, a substantive offense which the Court held, on the facts set forth in the bill of particulars, could have been committed only by Sweig in Washington, D.C. Veloshan did not commit that substantive offense, in Washington, and his merely traveling to Washington would not have made him less liable as an aider and abettor in New York.

In his brief appellant attempts to minimize the acts which he performed in New York, focussing on their incidental nature by comparison with the act of cashing the bonds in Pennsylvania. He does so to lend credence to his argument that he acted as a principal, in the commission of the substantive offense in Pennsylvania, rather than as an aider and abettor in both districts. Of course, any act within this District which aids and abets the commission of the substantive offense is sufficient to lodge venue here. *See, e.g., Gillette, supra.* In any event, the acts which Davis performed here were of crucial importance to the ultimate commission of the offense in Pennsylvania. In Manhattan he was contacted by Kareem, the man who furnished the bonds; he contacted the two women who would cash the bonds; he arranged the meetings at which firm plans were made; and he brought Ketchen and a typewriter to the apartment where Kareem held the bonds, in order that Ketchen might prepare appropriate identification. All these acts were done in furtherance of the commission, by the two women, of the crime of uttering the forged instruments, which took place in Pennsylvania.

These actions, in this District, were more than sufficient to lodge venue here.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

CONSTANCE CUSHMAN,
JOHN C. SABETTA,
*Assistant United States Attorneys, Of Counsel.*

# AFFIDAVIT OF MAILING

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK)

Constance Cushman being duly sworn, deposes and says that She is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30th day of October, 1975 She served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Daniel Sullivan, Esq.
Lovejoy, Wasson, Lundgren & Ashton
250 Park Ave
New York, NY 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Constance Cushman

Sworn to before me this
30th day of October, 1975

Jeanette Ann Graved

JEANETTE ANN GRAVED
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977.